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October Term, 1952

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Appellant,

—against—

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT.

D. ROGERS MAGLAR,
JAMES W. RYAN,
J. EDWARD TYLER, JR.,
Counsel for Appellant.

SUBJECT INDEX.

LIST OF AUTHORITIES CITED:

SUPREME COURT OF THE UNITED STATES,

October Term, 1922.

BLAMBERG BROTHERS,

Appellant,

—against—

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT.

Statement of the Case.

This is an appeal from a decree of the District Court of the United States for the District of Maryland dismissing a libel against the United States under the Suits in Admiralty Act of March 9, 1920, for want of jurisdiction. The decree is based on the theory that the clause in Section 2 of that Act, providing that suit may be brought in cases where if the vessel were privately owned "a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for," really means, provided "a proceeding in admiralty could be maintained IN THE UNITED STATES OF AMERICA at the time of the commencement of the action herein provided for." The sole issue is whether the lower Court was justified in interpolating the words "in the United States of America" into that clause of the statute. If the vessel had been privately owned at the time the action in the

present case was commenced, the appellant admittedly could have maintained a proceeding in admiralty against her in the port of Havana, Cuba. Such proceedings were in fact maintained against her by others (Suggestion of Want of Jurisdiction, par. 5; Record, p. 11; Motion of United States to Advance, p. 2).

The opinion of the lower Court (p. 14, Record; 272 Fed. 978) does not disclose the reason actuating the Court in requiring, as an additional condition precedent to suit, the ability to maintain the admiralty proceeding within the particular geographical limits of the United States, other than the general statements that "the principal purpose of the statute under which the proceeding was brought, was to prevent WITHIN THE UNITED STATES, the arrest upon judicial process of any government-owned ship;" that "there is no reason to suppose that Congress intended to make the United States suable under any circumstances in which a suit could not have been instituted IN THIS COUNTRY, were the ship or cargo privately owned, and yet if the libellant's contention be sustained, that will be the result here;" that no libel could have been "maintained against the ship *in rem* in any Court OF THE UNITED STATES, because none of them could have taken possession of her;" that "there was no Court IN THE UNITED STATES in which the suit could have been maintained either *in rem* or *in personam* had an individual occupied the same relation to the cause of action as was borne by the United States;" and that "there is no reason to suppose that it (Congress) intended to open the doors of its Courts as against the United States to suits which could not THERE have been prosecuted

against an individual or his property." There is nothing else in the opinion that would support the decision. It is clear that the decision would have been otherwise if the vessel had been within the United States, no matter in what district.

In a subsequent case on identical facts (*Smith* v. *United States;* opinion, August 4, 1922, as yet unreported, copy annexed hereto as Appendix A), Judge Foster of the District Court of the United States for the Eastern District of Louisiana, declined to follow the decision of Judge Rose in the present case, saying:

> "The defendant raises the question of jurisdiction. It is argued that there is no jurisdiction in any U. S. District Court unless the vessel is within the reach of the process of the Court, or at least within the territorial limits of the United States, as otherwise no Court in the United States would have jurisdiction *in rem;* that the vessel having changed owners after the claim for wages accrued, there could be no action *in personam* against the present owner if the vessel was owned by private parties. To support this the case *Blamberg* v. *U. S.*, 272 F. 978, is relied on. Considering the learning and experience of Judge Rose, this decision is undoubtedly entitled to great weight, but I am constrained to hold differently.
>
> The Act of March 9, 1920 contains no restriction in terms such as imposed by the decision in *Blamberg Bros.* v. *U. S. supra.* In fact, considering the divisions of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board cannot be seized *in rem* in any country."

Section 7 of the Act provides, in substance, that if a vessel owned by the United States is arrested in a foreign country the United States Consul shall file a claim that she is immune from arrest.

Moreover, the opinion of the lower Court in the present case does not mention the fact that, if its conclusion is correct, Section 5 of the Act, limiting the period within which suits may be brought to two years, might, in connection with Section 7, providing that vessels of the United States Government are immune even though in a foreign country, deprive libellants in this and other similar cases of any remedy whatever, inasmuch as the vessel involved might not (and in this case, as the event proves, did not) return to the United States within two years.

Statement of the Facts.

On July 26, 1920, the United States agreed to sell its schooner barge, the Catskill, to the Guidera Towing and Transportation Company for $60,000, payable in installments. On payment of the first installment the purchaser went into possession, although the United States retained title until payment of the final installment. No installment other than the first has been paid.

On October 6, 1920, at Baltimore, Blamberg Brothers, a Maryland corporation, the libellant, shipped on the Catskill 1,500 bags of corn for carriage to Havana, Cuba. The Catskill arrived at Havana in November, 1920, but failed to deliver the corn to the consignee, and admittedly, if owned by a private merchant, would have become liable *in rem* for libellant's damages, and, if so owned, an action could have been maintained

against her in Havana. On February 26, 1921, the Catskill being still in Havana with the corn on board, the libellant filed in the District Court of the United States for the District of Maryland, where it was incorporated and had its principal place of business, a libel against the United States under the Suits in Admiralty Act of March 9, 1920, "to recover against the government the liability *in rem* of the barge for the non-delivery of libellant's goods." (Opinion, lower Court, p. 14, Record.)

On April 22, 1921, the United States, appearing generally, filed an answer alleging lack of knowledge and demanding strict proof of all the allegations of the libel, but alleging that it "is advised that said barge Catskill is presently at Havana, Cuba, and has no knowledge of its own as to when the said barge is expected to arrive in this jurisdiction," and that, although at the time the corn was shipped the United States was "the qualified owner of the said barge Catskill," the Guidera Towing and Transportation Company had "complete control and custody" of her under the purchase agreement. A copy of the purchase agreement was annexed to the answer. In the eighth paragraph of the answer the United States admitted "the admiralty and maritime jurisdiction of this Honorable Court."

Before the cause was reached for trial, the United States, on May 3, 1921, filed a Suggestion, in the nature of a special appearance for the purpose of questioning the jurisdiction, alleging "that the said barge is now at the port of Havana, Cuba, without the jurisdiction of this Honorable Court and has been libelled in the sum of $3,725 for wage claims;" that the United States "cannot be proceeded against" for the *in rem* liability of the

Catskill, because at the time this libel was filed she was in Havana; and that, if it is suggested that the United States is liable not only for the *in rem* liability of the barge but also for an *in personam* liability as owner of the barge at the time the corn was shipped, the United States "cannot be proceeded against in an action *in personam*" on this latter liability, because no such liability was created.

On May 5, 1921, the libellant filed a "Memorandum in reply to the Suggestion filed by the Repondent" admitting the facts alleged in the Suggestion, and alleging that "your libellant is proceeding by a libel *in personam* against the respondent, as owner of the said barge Catskill, to establish a liability of the said barge Catskill, as provided for in the Act of Congress, approved March 9, 1920, commonly known as 'The Suits in Admiralty Act,'—the right to bring said libel *in personam* being created by said Act as a substitute for the ordinary libel *in rem*," and denying that "the jurisdiction of this Court over the matters alleged in the libel is dependent on finding said barge Catskill within the jurisdiction of this Honorable Court."

On May 31, 1921, the lower Court filed an opinion directing the entry of a decree dismissing the libel on the ground that, although if the vessel had been privately owned at the time the action was commenced, the libellant could have maintained a proceeding in admiralty against her in Havana, Cuba, it could not have maintained such a proceeding against her within the territorial limits of the United States.

On June 4, 1921, a decree was entered dismissing the libel for want of jurisdiction.

On the same day the lower Court issued a certificate stating that the libel "seeks to enforce a liability for non-delivery of cargo and cargo damage against the respondent when the *res* at the time of the commencement of this action and continuously since then has been located in the harbor of Havana, Cuba. The respondent denies the jurisdiction of this Court in this cause to entertain any proceeding in Admiralty under the provisions of the aforesaid Act, contending that had said *res* been privately owned no proceeding would lie, *in this Court* under the circumstances of this case. Now, therefore, it is certified that the question of the jurisdiction of this Court, upon the grounds hereinbefore stated, to-wit (that at the time said libel was filed and now this Court in this cause was without jurisdiction to entertain a libel either *in personam* or *in rem* under the Act of March 9, 1920, aforesaid) was the issue upon which this cause was decided."

On July 14, 1921, the libellant filed a petition for an order allowing an appeal to this Court, which was granted.

On the same day the libellant filed the following assignments of error:

(1) The Court erred in holding that it was without jurisdiction to entertain the libel filed herein;

(2) The Court erred in holding that the venue provisions of the Act of March 9, 1920, were not in the alternative, that is, allowing the filing of a libel in respect of suits authorized in said Act in either the place where the parties, or some of them, "reside or have their principal place of business in the United States, or in which the vessel * * * charged with liability is found."

(3) The Court erred in holding that an exclusively *in rem* liability attaching to a vessel owned by the United States could not, by virtue of said Act of March 9, 1920, be enforced by a libel *in personam* against the United States, brought in the District in which the libellant had its principal place of business in the United States.

(4) The Court erred in holding that an *in rem* liability attaching to a vessel owned by the United States could not, by virtue of said Act of March 9, 1920, be brought in a District other than a District in which the vessel so liable is found at the time of the filing of the libel.

On December 5, 1921, the appellant moved that the case be advanced for hearing. The motion was denied without prejudice to its submission upon printed briefs.

Shortly thereafter the Solicitor General moved that the case be advanced for hearing on the ground that "the jurisdictional questions presented by the appeal are highly technical and of unusual importance. Brief oral argument ought to assist in their proper presentation. * * * The jurisdiction of the District Courts in proceedings brought under the act must be speedily determined, as otherwise there will be continued uncertainty and embarrassment to the Government in the conduct of a class of litigation, considerable in amount, to the serious prejudice of the Government." The motion further stated (page 2, Motion to Advance), that "The barge was attached in Cuba in other proceedings filed against her there, and since the barge has been under attachment in Cuba." The motion was granted and the cause assigned for argument on December 4, 1922.

POINTS.

I.

The remedy afforded by Section 2 of the Act of March 9, 1920, is not limited to cases where, if the vessel were privately owned, a proceeding in admiralty could have been maintained within the territorial limits of the United States, but is available generally to all persons who could have maintained proceedings in admiralty against vessels of the United States anywhere in the world prior to the passage of this act.

The Act under which this suit is brought, has been construed in a number of decisions of various District Courts, but we have found only two cases in which the precise point involved in the present case appears to have been presented. In one of these cases, the Court expressly declined to follow the decision of Judge Rose in the present case; and in the other case the Court appears to have reached the conclusion (through a misapprehension as to the facts of the present case) that the cases were distinguishable.

In *A. Marion Smith* v. *United States* (unreported, opinion annexed hereto as Appendix A; Aug. 4, 1922; U. S. D. C. E. D. La.) a libel was filed "in the nature of an action *in rem* against

the vessel but is brought *in personam* against the United States under the provisions of Section 2 of the Act of Mar. 9, 1920, 41 S. 525." There being no privity of contract between the libellant and the United States, there was only an *in rem* liability of a vessel owned by the United States. The material facts are therefore identical with those in the present case. The libel was filed in the district where the libellant resided. The United States apparently excepted to the libel on the ground that as the vessel was not within the territorial limits of the United States or its possessions the libel could not be maintained in any district. The vessel, at the time the libel was filed, appears to have been in Buenos Aires, or on the high seas on a voyage from Buenos Aires to Liverpool, or in Liverpool. Judge Foster, in refusing to follow the decision of Judge Rose in the present case, said:

> "The defendant raises the question of jurisdiction. It is argued that there is no jurisdiction in any U. S. District Court unless the vessel is within the reach of the process of the Court, or at least within the territorial limits of the United States, as otherwise no Court in the United States would have jurisdiction *in rem;* that the vessel having changed owners after the claim for wages accrued, there could be no action *in personam* against the present owner if the vessel was owned by private parties. To support this the case of *Blamberg Bros.* v. *U. S.*, 272 F. 978 is relied on. Considering the learning and experience of Judge Rose this decision is undoubtedly entitled to great weight, but I am constrained to hold differently.

> "The Act of March 9, 1920 contains no restriction in terms such as imposed by the decision in *Blamberg Bros.* v. *U. S., supra,* In fact, considering the divisions of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board can not be seized *in rem* in any country."

In *Phoenix Paint & Varnish Co.* v. *United States* (unreported opinion annexed hereto as Appendix C.; Nov. 17, 1921; U. S. D. C. E. D. Pa.) the same point appears necessarily to have been decided. The libel was against the United States under the Suits in Admiralty Act for supplies furnished, apparently not at the request of the United States, to a vessel owned by the United States. Apparently therefore the suit was the same as in the case at bar, that is, on a solely *in rem* liability of the vessel. At least it is only that aspect of the case that is discussed or decided. The libel was filed in the district where the libellant resided. *The vessel was not within the district and it does not appear where she was.* The Court apparently believed that, in view of the election of the libellant to sue in the district of his residence, it was immaterial where the vessel might be. The United States excepted to the libel on the ground that it did not allege that the vessel was within the district. Judge Dickinson, in overruling the exception, said:

> "That act in effect declares that when there is a cause of action of this general nature which, under the law, could be enforced against a private person or against property owned by such person, it may be enforced against the United States with

this difference. The Act assumes that a cause of action may be such that if a private person were the respondent it might be enforced by process *in personam* or *in rem*. In such a case it shall not be enforced *in rem* against property of the United States, but may be enforced against the United States *in personam*, but shall be enforced as if it were process *in rem*, and that the process may issue from any Court within whose territorial jurisdiction the libellant resides or a Court within whose like jurisdiction the *rem* may be. The libellant resides within this District, and the proceedings are on their face at least, in accordance with the Act of Congress."

And speaking of the decision of Judge Rose in the present case, Judge Dickinson said:

"The present stage in the proceedings which we have reached is in substance a motion to dismiss for want of jurisdiction. The basis of the exceptions taken to the libel, as we grasp the thought back of them, can be best presented by a citation of the case of *Blamberg Bros.* v. *United States*, 272 Fed. Rep. 978, upon which the respondent relies. That case, however, is not in point. It was ruled upon the proposition that the Act of Congress gave no permission to proceed unless the libel be one which could be sustained if it were against a private person or the property of a private person. The libel there could not have been so sustained, and what would follow the ergo is too obvious to require statement.

"In the case at bar the libel could be maintained as against a private individual unless it failed because a good defence was

> interposed. It follows that we cannot dispose of the motion to dismiss without deciding the cause, and this we cannot do at the present stage of the proceedings."

Judge Dickinson thus appears to have misapprehended the decision of Judge Rose in the present case. Judge Rose obviously did not decide that the libellant in the present case could not at the time its libel against the United States was filed have maintained a proceeding against the "Catskill" if it had been "the property of a private person." He merely held that such proceeding could not have been maintained in the United States. Apparently therefore, Judge Dickinson on the same facts would have refused to follow the decision of Judge Rose. Judge Dickinson stated, as the holding of Judge Rose in the present case, the proposition for which we are contending.

I-A—THE EFFORT OF THE LOWER COURT TO READ INTO THE FIRST SENTENCE OF SECTION 2 OF THE ACT A REQUIREMENT THAT THE HYPOTHETICAL PROCEEDING IN ADMIRALTY BE MAINTAINABLE WITHIN THE TERRITORIAL LIMITS OF THE UNITED STATES IS BASED ON A MISTAKEN ASSUMPTION THAT CONGRESS INTENDED TO PREVENT THE ARREST OF VESSELS ONLY WITHIN THE UNITED STATES. THE COURT DOES NOT MENTION AND APPARENTLY OVERLOOKED THE FACT THAT CONGRESS, BY SECTION 7 OF THE ACT, INDICATED AN INTENTION THAT THE VESSELS SHOULD BE IMMUNE FROM ARREST EVEN IN FOREIGN COUNTRIES.

In *Smith* v. *United States, supra,* Judge Foster, declining to follow the decision of Judge Rose in the present case, said:

> "In fact, considering the provisions of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board can not be seized *in rem* in any country."

Section 7 of the Suits in Admiralty Act of March 9th, 1920, provides:

> "Sec. 7. That if any vessel or cargo within the purview of Sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any Court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said Court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter

the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the Clerk of the Court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments; *Provided, however*, that nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case."

It clearly appears from Section 7, and the other sections of the Act, that Congress was dealing with causes of action against merchant vessels owned by the United States, no matter where they might be, and that the substitute remedy against the United States *in personam* created by the Act, was to be available, to everyone hav-

ing such a cause of action, at all times within two years after the particular cause of action arose.

This conclusion is also supported by the fact that if the substitute remedy were not available so long as the vessel remained outside the United States, Section 5 of the Act would deprive the libellant of any remedy in cases like the present, where the vessel did not return within the time provided for suit. Section 5 of the Act of March 9th, 1920, provides:

> "Sec. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises."

The effort of the lower court to read into the first sentence of Section 2 a requirement that a proceeding be maintainable in the United States does violence to the plain meaning of the language used. The first sentence says that the proceeding must be maintainable. It does not specify where it must be maintainable. In the absence of specific limtiation, the requirement is completely satisfied if the proceding is maintainable anywhere. In the present case the proceeding was maintainable against the "Catskill" in Havana, Cuba (p. 11, Record; par. 5, Suggestion of Want of Jurisdiction; Motion to Advance, p. 2).

1-B—CONGRESS INTENDED BY THE ACT NOT ONLY TO PREVENT THE ARREST OF VESSELS, BUT ALSO TO ENCOURAGE LIBELLANTS WHO MIGHT HAVE CLAIMS MAINTAINABLE AGAINST THE VESSELS IN FOREIGN COUNTRIES TO BRING THEIR PROCEEDINGS *IN PERSONAM* IN THE UNITED STATES.

The argument of the Government and the decision of Judge Rose proceed on the assumption that the United States Government desired to force its citizens to sue its vessels in the courts of foreign countries wherever this remedy was available to them, although opening its own courts to such suits where jurisdiction could be had only in those courts. To state this proposition is to answer it. As might be expected, this view finds no support in the language of the Act. On the contrary, as pointed out by Judge Foster in the case of *Smith v. United States, supra*, Section 7 of the Act indicates an intent by Congress to prevent, as far as lay in its power, the seizure of vessels of the United States in foreign countries as well as in the United States; and to concentrate all such litigation in its own courts.

Moreover, the United States would thus avoid incurring the expense of furnishing surety bonds, and of retaining counsel to defend it in litigation in foreign countries.

The intention of Congress to discourage suits against United States vessels in foreign countries is shown by the provision in Section 7, that the United States Consul, if so directed by the Secretary of State, shall "claim such vessel or cargo as immune from such arrest."

I-C—CONGRESS CLEARLY INTENDED BY THE ACT TO SUBSTITUTE THE PERSONAL CREDIT OF THE UNITED STATES FOR THE SECURITY OF THE PARTICULAR VESSEL. IN THE PRESENT CASE THE LIBELLANT HAD A RIGHT TO ARREST THE "CATSKILL" AS SECURITY FOR ITS CLAIM. HAVING THAT RIGHT IT WAS WITHIN THE CLASS OF VESSEL CREDITORS ENTITLED TO SUE THE UNITED STATES *IN PERSONAM*.

Section 8 of the Act, providing that decrees in suits under the Act shall be payable "out of any money in the Treasury of the United States not otherwise appropriated," is substantially a pledge by the United States of those unappropriated moneys in the Treasury as a fund or stipulation to meet the liabilities incurred by the Shipping Board's vessels. This general pledge or stipulation was apparently intended as a substitute for multitudinous stipulations to release individual vessels from arrest. This pledge by the United States of all its unappropriated moneys or of its general credit was intended to be available to everyone who previously had a right to have a United States vessel arrested as security.

This is confirmed by the last two sentences of Section 3, which read:

> "Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United

> States Shipping Board or the United States Shipping Board Emergency Fleet Corporation shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause and assumes liability to satisfy any decree included within said bond or stipulation and thereafter any such decree shall be paid as provided in Section 8 of this Act."

This intent is also shown by the provision in Section 7 that in order to release one of the vessels described in the Act from arrest in a foreign country—

> "The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm or corporation, in the United States, its territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation, as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation";

and that the United States Consul, on direction from the Secretary of States, may

> "execute an agreement, undertaking, bond or stipulation for and on behalf of the United States or the United States Shipping Board, or such corporation as by said court required for the release of such vessel or cargo, and for the prosecution of any appeal."

I-D—IF CONGRESS INTENDED TO PREVENT VESSELS FROM BEING DELAYED BECAUSE OF ARREST UNDER LEGAL PROCESS, THE THEORY OF THE LOWER COURT THAT THE LIBELLANT IN THE PRESENT CASE SHOULD HAVE ARRESTED THE VESSEL IN CUBA RATHER THAN HAVE BROUGHT A SUIT *IN PERSONAM* AGAINST THE UNITED STATES WOULD, BY ENCOURAGING DELAY TO THE VESSEL, VIOLATE THE INTENTION OF CONGRESS.

Counsel for the United States contended in the court below that the purpose of the Act was to prevent vessels owned by the United States from being delayed because of arrest under legal process. It was asserted that the delay of only one day to any one of the larger Government vessels would, in view of their great value, result in a great loss of money; yet the theory of counsel for the United States, adopted by the lower court, would require that the libellant in the present case actually arrest the United States vessel in Cuba rather than bring a suit *in personam* against the United States in this country. If a proper stipulation were not promptly filed or a claim of immunity made by the United States, this arrest would result in delay to the vessel. Therefore, a denial to the libellant of a right to maintain the present proceeding would violate the intent of Congress, as interpreted by counsel for the United States.

The argument of the Government in the court below was that the "Catskill" would not have been delayed by any additional libels filed in Cuba

because she had already been attached and detained in suits brought there by other libellants. It is clear, however, that the interpretation of the Act cannot be varied in each particular case. The Act must be given a uniform general interpretation, and it is immaterial whether, in this particular case, the Government deemed it advisable to file a stipulation, and whether this particular vessel would or would not have been delayed by the filing of an additional libel in Cuba.

I-E—CONGRESS INTENDED TO GRANT A RIGHT TO SUE THE UNITED STATES *IN PERSONAM* TO EVERYONE WHO HAD A CAUSE OF ACTION AGAINST THE VESSEL UNDER SECTION 9 OF THE SHIPPING ACT OF 1916.

Although Section 9 of the Shipping Act of 1916 is not mentioned *eo nomine* in the Suits in Admiralty Act, a mere reading of them shows that the Suits in Admiralty Act, by substituting a new remedy, has repealed Section 9 of the Shipping Act so far as remedy (as distinguished from liability) is concerned. Section 13 of the Suits in Admiralty Act repeals all Acts inconsistent with its provisions.

Section 9 of the Shipping Act of 1916, so far as here material, provides:

> "Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely

> as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

It is apparent from a reading of the Suits in Admiralty Act that Congress undertook comprehensively to provide a remedy *in personam* in each case in which any merchant vessel owned by the United States might be subject to arrest anywhere in the world. The libellant clearly had a right to have the "Catskill" arrested at Havana, under Section 9 of the Shipping Act of 1916, as its right or cause of action was complete. It follows that it had a remedy by suit *in personam* against the United States in any of the Districts mentioned in the second sentence of Section 2 of the Suits in Admiralty Act.

I-F—THIS WOULD BE SO EVEN IF THE LIBELLANT HAD NO PRESENT ABILITY TO ARREST THE VESSEL, PROVIDED IT HAD A RIGHT OR CAUSE OF ACTION AGAINST HER.

Section 9 of the Shipping Act of 1916 was repealed by the Suits in Admiralty Act of March 9th, 1920, so far as remedy was concerned, but was not repealed as to liability of or causes of action against merchant vessels owned by the United States. Sections 1 and 7 of the Suits in Admiralty Act repeal the remedy provided by Section 9 of the Shipping Act of 1916. The first sentence of Section 2 of the Suits in Admiralty Act defines that part of Section 9 of the Shipping Act of 1916 which is not repealed. In other

words, the first sentence of Section 2 of the Suits in Admiralty Act deals only with causes of action, substantive rights or liabilities. The second sentence deals only with venue. Therefore, the phrase in the first sentence, if "a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for" requires only that the cause of action or substantive right be of an admiralty nature, and was merely intended to exclude common law causes of action on which the vessel might be arrested under foreign attachment.

The lower court and counsel for the United States endeavored to read into the first sentence a condition as to venue; that is, that the action be maintainable in the United States.

The first sentence does not require that the libellant be able to arrest the vessel at the time he files his libel. It merely requires that he have an admiralty cause of action enforcible, if the vessel were privately owned, on her coming within the Court's territorial jurisdiction. Congress eliminated from the original bill a proposed requirement in the first sentence that the substitute remedy should be available only if, in addition to there being an admiralty cause of action "the vessel or cargo could be arrested or attached at the time of the commencement of suit." The original bills (H. R. 7124, July 1, 1919, and S. 2253, June 23, 1919) provided, in Section 1, that the United States could be sued *in personam*:

> "* * * for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions, arising since April 6, 1917, out of or in connection with the possession, operation

> or ownership by the United States * * * of any merchant vessel, or the possession, carriage or ownership by the United States, or such corporation, of any cargo in those cases where, if the United States were suable as a private party, a suit *in personam* could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel *in rem* could be maintained *and the vessel or cargo could be arrested or attached at the time of the commencement of suit.*"

The same language, with the substitution of the phrase "suit *in rem*" for the phrase "libel *in rem*" is used in Senate Bill S. 3076, introduced September 25, 1919, as a substitute for Senate Bill S. 2253. Senate Bill S. 3076 was enacted by the Senate in this form, and sent to the House. The House substituted an entirely new draft, known as "The Attorney General's Substitute," which was agreed to by the Senate and became, in substance, the Act of March 9, 1920. The phrase "and the vessel or cargo could be arrested or attached at the time of the commencement of suit" does not appear in the Act as passed. This phrase was in the original drafts of the Bill and in S. 3076 as first passed by the Senate. Its elimination indicates that the requirement that the vessel could be "arrested or attached" was in excess of the requirement that "a suit *in rem* could be maintained." As finally passed, therefore, the Act merely requires the libellant to show that his cause of action or substantive right is one such as District Courts "ordinarily have cognizance" of "in their admiralty and maritime jurisdictions."

We, therefore, submit that Congress intended to provide a remedy *in personam* against the United States in every case in which the vessel, if privately owned, would be liable *in rem*. The physical presence of the vessel in the United States rather than in a foreign country was neither an express nor an implied condition of this relief.

I-G—THE INTENTION OF CONGRESS IS EXPRESSED IN UNAMBIGUOUS LANGUAGE. IT IS, THEREFORE, UNNECESSARY TO RESORT TO HEARINGS BEFORE CONGRESSIONAL COMMITTEES OR OTHER EXTRINSIC AIDS TO INTERPRETATION.

It is elementary that aids to the interpretation of a statute may only be used when the intent of Congress may not be gathered from the wording of the Act or the language used is ambiguous.

In *City of New York* v. *Whitridge*, (1919), 227 N. Y. 180, this rule was aptly expressed. The Court said:

> "The legislative intent is found in the legislative language which, as this Court has had occasion to say, unqualifiedly commands."

In *Matter of Dean*, (1920), 230 N. Y. 1, the Court said:

> "Manifestly the plain meaning of a statute cannot be changed by extrinsic evidence or unjustifiable interpretation."

In *Bate Refrigerating Company* v. *Sulzberger*, (1895), 157 U. S. 1, at page 36 this Court stated:

> "In our judgment the language used is so plain and unambiguous that a refusal

> to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But as declared in *Hadden* v. *Collector*, 5 Wall, 107, 111, 'What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature.'"

Judge Rose in the lower court decided this case upon his view of what the unexpressed intention of Congress was. Judge Foster decided the *Smith* case (Appendix A, hereto) upon the expressed intention of Congress contained in the Statute itself. It is almost obvious that where no ambiguity exists in a statute, resort to interpretation is unnecessary, and in all cases, in the construction of a statute, the express intention of the lawmaking body governs.

If Congress had intended that the Act should have the narrow scope contended for by counsel for the United States in this case, it could easily have expressed itself to that effect. The words themselves are perfectly plain. The Act does not state that the place in which the proceeding could be maintained were the vessel privately owned or possessed has any bearing on the right of action, but merely that "in cases where if such

vessel were privately owned or possessed" a proceeding in admiralty could be maintained, a libel *in personam* may be brought.

It is no hardship for the United States to be sued in this case in the District of Maryland. The contract of affreightment was entered into there, nearly all the witnesses are there, and to force the libellant to bring its action in the district in which the vessel happens to arrive on her return to the United States would do violence to the clear terms of the Act, which provide that suit may be brought in the district where the libellant resides or has its principal place of business.

I-H—THE LOWER COURT, IN ORDER TO SUPPORT ITS THEORY, WAS COMPELLED TO IGNORE THE PLAIN LANGUAGE IN THE FIRST SENTENCE OF SECTION 2 AND TO RESORT TO EXTRINSIC AIDS TO INTERPRETATION.

Counsel for the United States in the lower court, in endeavoring to show the intention of Congress, relied largely on hearings before Congressional Committees. The testimony before these committees was largely by a lawyer who, although not a member of Congress, had, as counsel for the Shipping Board, drafted a proposed Bill, which differs substantially from the Act as passed. The hearings show conclusively that almost all his testimony was directed toward the Bill that he had drafted. Although his testimony, it is believed, is more harmful than helpful to the Government, we submit that this Court should not resort to such testimony for guidance as to the meaning of the Act.

II.

The United States, by appearing generally and answering in this suit, there having been at the time the suit was commenced jurisdiction of the person or vessel at Havana, waived any requirement as to venue or jurisdiction of the person.

In *United States* v. *Hvoslef*, 237 U. S. 1, 11, Mr. Justice Hughes delivering the opinion of this Court, said:

> "Another objection to the jurisdiction of the District Court is that under section 5 of the Tucker Act * * * the suit was to be brought 'in the district where the plaintiff resides.' 24 Stat. 506. * * * It is said that the allegation was insufficient to show the residence required by the statute. * * * But assuming that the subject matter was within the jurisdiction of the court the requirement as to the particular district within which the suit should be brought was but a modal and formal one which could be waived, and must be deemed to be waived in the absence of specific objection upon this ground before pleading to the merits. *St. Louis Ry.* v. *McBride*, 141 U. S. 127, 131; *Central Trust Co.* v *McGeorge*, 151, U. S. 129, 133; *Martin* v. *Balt. & Ohio R. R.*, 151 U. S. 673, 688; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217, 220; *Western Loan Co.* v. *Butte & Boston Mining Co.*, 210 U. S. 368; *Arizona & New Mexico Ry.* v. *Clark*, 235 U. S. 669, 674."

The subject matter of the suit in the case at bar, the liability of a vesel *in rem* for non-delivery of and damage to cargo, is unquestionably within the admiralty jurisdiction of the court. The United States must either contend that the "Catskill" was immune from arrest in Havana in any proceeding in admiralty filed by your libellant or admit that such proceeding could be maintained in Havana. If immune, Congress clearly intended to substitute a remedy *in personam* against the United States. If not immune, the question, so far as the United States was concerned, was merely one of mode or venue. A suit in Havana against a vessel owned by the United States would be a suit against the United States. *The Western Maid*, 257 U. S. 491. The United States might well prefer that suits against it be instituted in this country where its attorneys reside. This preference was shown in the present case on April 22, 1921 by answering generally.

III.

It was unnecessary for the libellants in this case to elect whether to proceed *in personam* or *in rem;* but the libellant did in fact elect to proceed in accordance with the principles of libels *in rem.*

It was suggested, by counsel for the Government, in the Court below, that the appellant could not recover because it had not elected, in its libel, to have the case proceed in accordance with the principles of libels *in rem* as permitted under

Section 3 of the suits in Admiralty Act. The provisions of the Act on this point are somewhat obscure and it is difficult to determine, with certainty, the purpose for which they were inserted. We sumbit, however, that this provision for election by the libellant cannot be construed as a limitation of the remedies granted to the libellant in the preceding section (Section 2) of the Act. The provision of Section 3 with respect to election by the libellant is permissive in form and was clearly designed to afford additional protection to the libellant. Apparently, it was inserted out of an abundance of caution to insure that the change in the form of procedure (from *in rem* to *in personam*) should not prejudice any rights which the libellant would have had in a proceeding *in rem* against a Shipping Board vessel under Section 9 of the Act of 1916. The language of the provision with respect to election clearly indicates that it relates to matters of procedure and to the rights of libellants *inter sese*, rather than to the cause of action in respect of which the libel is filed.

Having previously (in Section 2) granted the right to file a libel *in personam* in every case where "a proceeding in admiralty could be maintained," if the vessel were privately owned, it is scarcely to be assumed that Congress intended to limit or qualify this grant in a later section by a clause which, in form, purports to grant additional protection to the libellant.

We deem it unnecessary, however, to argue this point at length, for the reason that there was a clear election by the libellant in this case to have the litigation proceed in accordance with the principles of libels *in rem*. It is true that the libel,

as originally filed, did not contain any express election. Shortly after the filing of the libel and answer, however, the Government filed a Suggestion of Want of Jurisdiction and the appellant filed a reply to this suggestion. In Paragraph 6th of this reply the appellant said:

> "Your libellant is proceeding by a libel *in personam* against the respondent, as owner of the said barge 'Catskill,' to establish a liability of the said barge 'Catskill,' as provided for in the Act of Congress, approved March 9, 1920, commonly known as 'The Suits in Admiralty Act'—the right to bring said libel *in personam* being created by said Act as a substitute for the ordinary libel *in rem*."

No objection was made to this reply and the case actually proceeded to trial on the Government's suggestion and the appellant's reply. This appears clearly from the statement of Judge Rose in his opinion that

> "This libel has been filed to recover against the Government the liability *in rem* of the barge for the non-delivery of libellants' goods."

Even if this Court should hold that this appellant can only succeed by virtue of an election to have the litigation proceed in accordance with the principles of libels *in rem*, it can scarcely be argued that the libellant must fail because the election was not physically incorporated in the original libel but in a separate document. The Government's suggestion and the appellant's reply were clearly intended as supplements or amendments to the answer and libel, respectively.

The Admiralty Courts have always exercised the utmost liberality in the matter of amendments to pleadings, and where the issues are fully and clearly set forth in pleadings filed and received without objection by either party, we submit that this Court will not entertain, at this late date, any technical objection based on the informal character of the pleadings. This is particularly true where the case proceeded to trial and was decided on the pleadings as actually filed, without any such objection being raised. If any authority be required on this proposition, we call the Court's attention to the following case:

DuPont v. *Vance*, 19 How. (U. S.) 162.

IV.

There is nothing in the language of the act to indicate that the right to sue in the district of libellant's residence is limited to cases where, if the vessel were privately owned, an action *in personam* could have been maintained against the owner.

In the lower court the Government insisted that much significance attached to the alternative venue granted in Section 2 of the Act. Although the point was not decided by Judge Rose, the Government argued with great emphasis that the alternative provisions as to venue were not applicable in all cases, but that they must be

applied separately to different classes of cases, *i. e.*, that the provision allowing suit in the district of the libellant's resident was applicable only in suits to enforce an *in personam* liability, and the provisions allowing suit in the district where the vessel could be found was applicable only in suits to enforce an *in rem* liability.

We submit that the language used is quite simple and natural, in view of the subject matter, and requires no close analysis or labored explanation. The option given to the libellant by this Act is one which he has in the great majority of cases where suit is brought against a private owner or his vessel. Where, as frequently happens, the libellant has his option to proceed against either the owner *in personam* or the vessel *in rem*, it naturally follows that he has the option to sue either in his own district (if the owner can be found there) or in the district where the vessel can be attached. Congress granted to the libellant the same options in this Act, using general language without any qualifying words to indicate that certain classes of suits could only be brought in a certain district or jurisdiction. The Government's argument amounts to this, that if Congress had expressed its intention fully, it would have said that an *in rem* liability could only be enforced in the district where the vessel could be found; an *in personam* liability only in the district where the libellant resides or has his principal place of business; and (if we understand the argument correctly) a liability existing both *in rem* and *in personam* in either district. What Congress might have said if these various situations had been specifically brought to its attention is an

interesting matter for speculation; but we think such speculation is too attenuated to be used as the foundation for a strained and artificial construction of the clear and simple language of the second sentence of Section 2 of the Act. Nor does this language seem to us to require any explanation. There is ample precedent for permitting the libellant to sue in his own district, which is usually more convenient for him and equally convenient for the Government. On the other hand, it may frequently be more convenient for the libellant to have the suit brought where the vessel is, if the officers and crew of the vessel happen to be important witnesses in the case, particularly if the vessel is one which is making short voyages, so that the witneses will be available to appear at the trial. After giving these alternatives, Congress then provided, out of an abundance of caution, that the cause might be transferred to any other district, in the discretion of the Court, on the application of either party.

The important point to be borne in mind, in this connection, is that there can be no possible reason, in proceedings under the Act, for distinguishing between the enforcement of rights *in rem* and rights *in personam*, since the vessel can, in no event, be attached. Accordingly, the fundamental reason which makes it necessary to bring proceedings *in rem* against privately owned vessels in the districts where they can be found, is wholly absent in proceedings under the Act, and cannot be presumed to have influenced the mind of Congress.

The same argument which the Government made in this case in the court below, with respect

to the venue provisions of Section 2 of the Act, was fully considered and rejected by Circuit Judge Mack, in the Southern District of New York in the case of *Herman W. Alsberg* v. *United States* (unreported, opinion annexed hereto as Appendix B.: Sept. 15, 1922, D. C. S. D. N. Y.). In that case a libel was filed in the Southern District of New York, the district of libellant's residence, against the United States *in personam* under the Suits in Admiralty Act to enforce a solely *in rem* liability of a United States vessel. At the time the suit was commenced the vessel was not within the Southern District of New York but was within the territorial limits of the United States. The United States excepted to the libel because it did not allege that the vessel was within the Southern District of New York. The Court overruled the exception on the ground that as the vessel was within the territorial limits of the United States, the libellant had an election to sue either in the district of his residence or in the district where the vessel was. The Court said:

> "2. The question in these cases is whether, under this Act, a proceeding in admiralty may be brought against the Government in a District other than that in which the vessel is found, under circumstances under which the vessel, if privately owned, would be liable *in rem* though the owner would not be liable *in personam*."
>
> * * * * *
>
> "But if, at the time the proceeding under the Act is brought, the vessel is anywhere within the jurisdiction of the United States, so that, if privately owned, a proceeding in admiralty would be maintainable against it in some District Court, I can see no reason for interpreting the clear

language of the Act so as to limit the venue in a suit against the United States to the District Court of the jurisdiction in which the vessel may then be found.

"The very unusual provisions in the Act for a transfer of the case to any District within the country that the Court may deem proper, is to my mind a clear indication that the venue provisions are to be most liberally and not most strictly construed.

"Even if as a matter of comity I did not feel bound to follow the decision of Judge Hand overruling a similar exception in the case of the *Eagle Oil Transport Co.* v. *U. S.*, October 28, 1921, I shou'd independently reach the same conclusion."

CONCLUSION.

It is respectfully submitted that, as the Court below had jurisdiction, its decree should be reversed with costs.

Dated November 10th, 1922.

D. ROGER ENGLAR,
JAMES W. RYAN,
J. EDWARD TYLER, JR.,
Counsel for Appellant.

Appendix A.

No. 16,498.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF LOUISIANA IN ADMIRALTY.

A. MARION SMITH,

—against—

UNITED STATES OF AMERICA

This is a libel by a seaman for wages, transportation from Buenos Aires to the United States and damages. The proceeding is in the nature of an action *in rem* against the vessel but is brought *in personam* against the United States under the provisions of Section 2 of the Act of Mar. 9, 1920, 41 S. 525.

It appears that on June 28, 1919, libellant shipped at New Orleans as wireless operator on the American merchant ship "Nawitca," for a voyage to Liverpool, via Buenos Aires and other ports, and back to a port of discharge in the United States, for a term not exceeding six months, at a wage of $110 per month.

After various delays, mainly due to defective boilers, the vessel arrived at Buenos Aires on September 10, 1919, and remained there until after December 29th, 1919, when his six months term expired.

Libellant claims wages at $125 per month, alleging that the wages of all shipping board employees had been raised. Under his contract he was entitled to $660 less $321.45, consisting of port payments of wages and slop chest charges. Under the contract he had due him $388.55. This amount the master offered to pay him but he refused to accept it, claiming transportation back to the United States and one month's extra pay for discharge in a foreign port.

Prior to June 3, 1919, the "Nawitca" was owned by the United States Shipping Board, and on that day she was sold with other vessels to the Nacirema S. S. Corporation, and delivered at New Orleans on June 9th, 1919. $125 was paid on account and a mortgage retained for the balance. On May 21, 1920, by agreement with the U. S. Shipping Board, the "Nawitca" was transferred by the Nacirema Company to the Brooks S. S. Corporation, that company assuming the balance of the purchase price, and a mortgage was executed. On July 29, 1920, the U. S. Shipping Board reacquired the "Nawitca" by agreement with the Nacirema S. S. Corporation and the Brooks S. S. Corporation.

It is apparent from the above stated facts that during the term of libellant's employment the "Nawitca" was not owned by the U. S. Shipping Board. Nevertheless, under the admiralty law, libellant has a lien on the vessel in the hands of her present owners, the U. S. Shipping Board for any wages lawfully due. This would not be affected by the mortgage presumably under which the Shipping Board reacquired her. Wages are preserved as a preferred maritime lien superior to a mortgage. Subsection M. Ship Mortgage Act,

Section 30, Act June 5, 1920, ch. 250, 41 S 1000.

The defendant raises the question of jurisdiction. It is argued that there is no jurisdiction in any U. S. District Court unless the vessel is within the reach of the process of the Court, or at least within the territorial limits of the United States, as otherwise no Court in the United States would have jurisdiction *in rem;* that the vessel having changed owners after the claim for wages accrued, there could be no action *in personam* against the present owner if the vessel was owned by private parties. To support this the case *Blamberg Bros.* v. *U. S.*, 272 F. 978 is relied on. Considering the learning and experience of Judge Rose this decision is undoubtedly entitled to great weight, but I am constrained to hold differently.

The Act of March 9, 1920 contains no restriction in terms such as imposed by the decision in *Blamberg Bros.* v. *U. S., supra.* In fact, considering the divisions of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board can not be seized *in rem* in any country. It was certainly never the intention of Congress to deprive a seaman of any of his rights guaranteed by the admiralty law. Those rights have been extended by legislation from time to time rather than restricted. I think the statute should be given the broadest interpretation.

Coming now to the merits of the case, libellant is clearly not entitled to anything more than the master offered to pay him. At the time the wages accrued the vessel was not in the possession of the Shipping Board, and therefore any agreement made by that corporation with regard to wages generally would have no application. He was not improperly discharged in a foreign port. His

contract had expired and he could elect to accept his discharge, which he did, or he might have continued with the vessel until she reached an American port. Furthermore, it cost him nothing to return to the United States.

There will be judgment in favor of libellant in the sum of $338.55 with interest at five per cent. from judicial demand, costs of Court to be paid by respondent.

August 4, 1922.

(Signed) RUFUS E. FOSTER,
Judge.

Appendix B.

IN THE
UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HERMAN W. ALSBERG,

—against—

UNITED STATES OF AMERICA.

MEMORANDUM OPINION.

MACK, *Circuit Judge*:

1. In the light of the decision of the Supreme Court in *U. S.* v. *Pfitsch*, June 1, 1921, it would seem that the Suits in Admiralty Act of March

9, 1920, gave exclusive jurisdiction to the District Courts of the United States of proceedings against the United States as owner of a merchant vessel directly or through a corporation in which it owned the entire stock, in those circumstances in which, if such vessel were privately owned, an admiralty proceeding could be maintained.

2. The question in these cases is whether, under this Act, a proceeding in admiralty may be brought against the Government in a district other than that in which the vessel is found, under circumstances under which the vessel, if privately owned, would be liable *in rem* though the owner would not be liable *in personam*.

Judge Rose, in *Blamberg Bros.* v. *U. S.*, 272 Fed., 978, has held, and in my judgment correctly, that if at the time the proceeding is brought the vessel is not within any jurisdiction in the United States the libel is not maintainable. The reason is not that the vessel is free from liability, but that when neither a privately owned vessel nor its owner could be sued in any Court of the United States, the Act should not be construed, in the absence of express provision, to subject the United States to suit, under similar circumstances.

But if, at the time the proceeding under the Act is brought, the vessel is anywhere within the jurisdiction of the United States, so that, if privately owned, a proceeding in admiralty would be maintainable against it in some District Court, I can see no reason for interpreting the clear language of the Act so as to limit the venue in a suit against the United States to

the District Court of the jurisdiction in which the vessel may then be found.

The very unusual provisions in the Act for a transfer of the case to any District within the country that the Court may deem proper, is to my mind a clear indication that the venue provisions are to be most liberally and not most strictly construed.

Even if as a matter of comity I did not feel bound to follow the decision of Judge Hand overruling a similar exception in the case of the *Eagle Oil Transport Co.* v. *U. S.*, October 28, 1921, I should independently reach the same conclusion.

Exceptions overruled.

U. S. Circuit Judge.

September 15, 1922.

Appendix C.

IN THE
DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
SITTING IN ADMIRALTY.

PHOENIX PAINT & VARNISH COMPANY,

—against—

UNITED STATES OF AMERICA, owner of the American Steamships "ANNA E. MORSE," "COLIN H. LIVINGSTONE," "JENNIE R. MORSE," "E. A. MORSE," "H. F. MORSE."
(Five separate actions.)

SUR EXCEPTIONS TO LIBEL.

DICKINSON, *D. J.*:

The libel is for supplies furnished to a vessel. The vessel is the property of the United States. Every line of thought which the mind can follow has a beginning.

We begin with the proposition that no cause of action, however, good in itself, can be enforced either *in personam* against the United States or *in rem* against its property, except as the United States, acting through the Congress, has consented may be done. It is unnecessary to establish this as a proposition of law because the parties admit it. The inquiry has only an

academic value. Whether this immunity flows from the dignity of the sovereign, and because the respondent is clothed in the royal purple, or whether it follows a principle of judicial policy that Courts will enter no judgments which they cannot enforce, and as all the power of this Court to enforce its judgments is supplied by the respondent, it follows that we are powerless to enforce an order upon this respondent to do anything which it is unwilling to voluntarily do.

The next step in our logic is a forced one. We are driven to look for a statutory consent. It is found, if at all, in the Act of Congress, March 9th, 1920. That Act in effect declares that when there is a cause of action of this general nature which, under the law, could be enforced against a private person or against property owned by such person, it may be enforced against the United States with this difference. The Act assumes that a cause of action may be such that if a private person were the respondent it might be enforced by process *in personam* or *in rem*. In such a case it shall not be enforced *in rem* against property of the United States, but may be enforced against the United States *in personam*, but shall be enforced as if it were in process *in rem*, and that the process may issue from any Court within whose territorial jurisdiction the libellant resides or a Court within whose like jurisdiction the *rem* may be. The libellant resides within this District, and the proceedings are on their face at least, in accordance with the Act of Congress.

The present stage in the proceedings which we have reached is in substance a motion to

dismiss for want of jurisdiction. The basis of the exceptions taken to the libel, as we grasp the thought back of them, can be best presented by a citation of the case of *Blamberg Bros.* v. *United States,* 272 Fed. Rep. 978, upon which the respondent relies. That case, however, is not in point. It was ruled upon the proposition that the Act of Congress gave no permission to proceed unless the libel be one which could be sustained if it were against a private person or the property of a private person. The libel there could not have been so sustained, and what would follow the ergo is too obvious to require statement.

In the case at bar the libel could be maintained as against a private individual unless it failed because a good defence was interposed. It follows that we cannot dispose of the motion to dismiss without deciding the cause, and this we cannot do at the present stage of the proceedings.

The defence which we are asked to uphold is, if we have caught the thought, that the United States did not contract the debt. We will not now anticipate the findings which properly follow the trial by now finding whether the fact averred should be found to be the fact, nor whether this mere fact, if found, constitutes a defense.

The libellant relies upon the case of *Middleton & Co.* v. *United States,* 273 Fed. Rep. 199. We do not see that this case is in point either. It was there ruled that as the libellant was a resident of no District and as the *rem* could not be located, the libel might be filed in any District or the libellant was without remedy. This

ruling may or may not be open to the criticism directed against it that the question was whether Congress had authorized the proceedings brought to be brought against the United States. If consent to bring the proceeding which was brought in that case had not been given, the omitted consent was not supplied by a finding that the libellant there was without remedy. The being without remedy to enforce a meritorious claim is always a hardship, but the remedy is to supply the omission, not to assume it to exist when in fact it does not. Such a principle would subject the United States to judicial process in every case in which the libellant was otherwise without a remedy, and in that case resulted in giving to the libellant whose case was omitted from the Act a broader right and a greater privilege than was given to those who were clearly within the Act. It does not do to say that the right to sue would doubtless have been given had Congress had cases of that particular kind in mind. Congress has the undoubted power and duty to say not only in what kind of cases the United States may be sued, but also to say in what Court the suit may be brought.

In the case at bar the Act of Congress not only confers jurisdiction upon the District Courts but has also declared the proper venue by designating this Court as the Court to try this case if the libellant elects to file the libel here. It would be a shirking of the duty which Congress has imposed upon this Court to refuse to entertain the cause.

The exceptions are dismissed.

November 17, 1921.

Appendix D.

SUITS IN ADMIRALTY ACT.

[PUBLIC—NO. 156—66TH CONGRESS.]
[S. 3076.]

An Act Authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein

provided for, a libel *in personam* may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. [Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found.] The libellant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel *in rem* or *in personam* in any district, a cross-libel *in personam* may be filed or a setoff claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the Court, be transferred to any other District Court of the United States.

SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied,

or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the Court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in Section 8 of this Act.

SEC 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such

corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libellant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

SEC. 6. That the United States or such corporations shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

SEC. 7. That if any vessel or cargo within the purview of Sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any Court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such vessel, or the possession,

carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States Consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said Court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any suit, certified by the Clerk of the Court and authenticated by the certificate and seal of the United States Consul claiming such vessel or cargo, or his successor, and by the certificate

of the Secretary of State as to the official capacity of such Consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

SEC. 8. That any final judgment rendered in any suit herein authorized, and any final judgment within the purview of Sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of Section 9 of this Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

SEC 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of Sections 2, 4, 7, and 10 of this Act.

SEC. 10. That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel.

SEC. 11. That all moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such aforesaid corporation, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

SEC. 12. That the Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the

United States and such aforesaid corporation and the Secretary of any department of the Government of the United States, and the United States Shipping Board, and the board of trustees of any such aforesaid corporation, shall likewise report the arbitration awards or settlements of claims which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived.

SEC. 13. That the provisions of all other Acts inconsistent herewith are hereby repealed.

Approved, March 9, 1920.